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"My keenest interest is excited, not by what are called great questions and great cases but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution, or a telephone company, yet which have in them the germ of some wider theory, and therefore some profound interstitial change in the very tissue of the law."—MR. JUSTICE HOLMES, Collected Legal Essays, p. 269.

NOTES ON RECENT CASES

ACTIONS BASED UPON ASSESSMENTS BY A COURT OF EQUITY AGAINST NON-RESIDENT SHAREHOLDERS OR MUTUAL INSURANCE POLICY HOLDERS.

Assume that a corporation is indebted to A and that A is unable to collect from the corporation because of its lack of assets. The question then arises as to how A can proceed to collect the debt from the shareholders, if the shareholders of the corporation are liable to creditors because of a contractual liability to pay for their stock, or because of an agreement to bear assessments, or because of a statutory liability imposed. This question is often complicated by the fact that some or all of the shareholders are non-residents of the state of the domicile of the corporation. There are three methods of enforcing the liability of shareholders mentioned above.

Missouri and many states follow the first method attempted at com-

mon law.[1] The creditor sues the corporation, and if execution is issued and returned unsatisfied, then the creditor is allowed to sue any shareholder over whom personal jurisdiction can be acquired. The creditor, however, cannot recover more than the contractual or statutory liability of the shareholder. In Missouri, by statute, execution can be issued against the shareholder in a summary proceeding by the court that rendered the judgment against the corporation to the amount of the unpaid balance of the stock owned by him.[2] In a suit against a shareholder residing outside the state that rendered the judgment against the corporation, the United States Supreme Court has held that the state of the *forum* must give the same effect to the judgment that would be given in the state where it was rendered.[3] Even though the shareholders were not personally served in the suit against the corporation, they are bound as to matters adjudicated in the suit between the creditor and the corporation, because a judgment is conclusive between the parties and their privies, and every shareholder is privy to the corporation.[4] It has been urged that this method is particularly unsatisfactory because it apportions the burden unequally between the large and small shareholders. Naturally, the creditors will select the large shareholders and sue them, and very often the creditors will not sue the small shareholder because it would not be worth while to do so from a monetary point of view.[5]

The next method is a statutory remedy that is similar to a bill of peace. After it is shown that the corporation is unable to meet its debts, the creditors are given an allotted time to file bills in equity against the corporation and all the alleged shareholders subject to the jurisdiction of the court. Under this method personal judgments are rendered against the shareholders as to their ratable proportion of the debts. This method is objectionable in that the shareholders outside the state of incorporation often escaped liability, as they are not subject to the jurisdiction of the state rendering the judgments. To meet this difficulty the assessment plan was adopted.[6]

1. Scott v. Barton, 285 Mo. 427, 226 S. W. 958 (1920).

2. Mo. Rev. Stat. (1929) sec. 4572; Nichols v. Stevens, 123 Mo. 96, 25 S.W. 578 (1894); Washington Sav. Bank v. Butchers and Drovers' Bank, 107 Mo. 133, 17 S.W. 644 (1891); Erskine v. Lowenstein, 82 Mo. 301 (1884).

3. Hancock National Bank v. Farnum, 176 U.S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619 (1899); Whitman v. Oxford National Bank, 176 U.S. 559, 20 Sup. Ct. 477, 44 L. Ed. 587 (1899).

4. Hancock Nat'l Bank v. Farnum, *supra*, note 3; Scott v. Barton, *supra*, note 1; Johnson v. Stebbins-Thompson Realty Co., 177 Mo. 581, 600, 76 S.W. 1021 (1903); Nichols v. Stevens, *supra*, note 2; Coquard v. Prendergast, 35 Mo. App. 237 (1889). But see Taylor v. Fontaine, 10 S.W. (2d) 68 (Mo. App. 1930).

5. Abbott, *Conflict of Laws and the Enforcement of the Statutory Liability of Stockholders in a Foreign Corporation* (1909) 23 Harv. L. Rev. 37. Good theoretical discussion of the various methods used to enforce the stockholder's liability.

6. Abbott, *op. cit. supra*, note 5.

Under the assessment method, a court of equity levies ratable assessments upon all the shareholders for their just proportion of the debts after the assets of the corporation have been exhausted; the assessments, however, must not exceed the shareholder's statutory or contractual liability. In computing the amount of the assessments the court makes allowances for the insolvent shareholders, and the expenses of collecting the assessments. It seems to be well settled that in making the assessments a court of equity can exercise the powers of the board of directors, that is, all the powers that the directors were authorized to exercise by the contract, or by statute.[7] A receiver cannot sue outside the jurisdiction of the court that appoints him, unless a statute vests the property of the debtor in him, or the debtor conveys the property to the receiver.[8]

Assuming that the judgments have been rendered or the assessments have been made in the state of the domicile of the corporation, then our next problem is how to enforce these judgments or assessments against nonresident shareholders or mutual insurance policy holders.

In a suit on a foreign judgment many difficulties often arise because the plaintiff has not made sufficient or proper allegations in the petition. In general, the plaintff should declare on the debt owing to the plaintiff by the defendant; identify the judgment by the date, amount, rate of interest, the court in which it was rendered, and the name of the justice or judge. He should allege that the judgment has not been paid, suspended, appealed from, or discharged in any manner; the amount unpaid with interest; and pray judgment for this amount with costs.[9] As a general rule, courts of general or superior jurisdiction are presumed to act by right, and thus it is unnecessary to plead facts to show that the court had jurisdiction over the subject matter.[10] At common law, it is necessary in pleading the rendition of a judgment of an inferior tribunal, or that of a court of general jurisdiction in the exercise of special jurisdiction to aver all the jurisdictional

7. Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986 (1895); Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184 (1889); Scovill v. Thayer, 105 U. S. 143, 26 L. Ed. 968 (1881); Freedy v. Trimble-Compton Produce Co., 32 S. W. (2d) 147 (Mo. App. 1930). See Washington State Bank v. Butchers & Drovers' Bank, *supra*, note 2.

8. Great Western Mining Co. v. Harris, 198 U. S. 561, 25 Sup. Ct. 770, 49 L. Ed. 1163 (1905); Hale v. Allinson, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380 (1902); Booth v. Clark, 17 How. (U. S.) 332, 15 L. Ed. 165 (1855).

9. Bick v. Vaughn, 140 Mo. App. 595, 120 S. W. 618 (1909), holding that the petition stated facts sufficient for a cause of action upon a judgment rendered by a justice of the peace, in accordance with section 764, Mo. Rev. Stat. (1929).

10. Wonderly v. Lafayette County, 150 Mo. 635, 51 S. W. 745 (1899). See State ex rel Stack v. Grimm, 239 Mo. 340, 143 S. W. 450 (1911); 2 Freeman on Judgments (5th ed. 1925), secs. 1106, 1107.

facts.[11] But by statute in Missouri it is only necessary to state that the judgment was duly rendered in order to prove the jurisdiction of the court rendering the judgment.[12] The plaintiff in an action upon a foreign judgment, if he derives his right to sue from a statute, must allege the statute in full or its substance, or his petition will fail to state a cause of action.[13] If the judgment has been assigned to the plaintiff, it is well recognized that he must plead and prove the assignment. The point most often overlooked is the allegation stating the legal effect of the judgment where it was rendered. The full faith and credit clause of the United States Constitution,[14] and the acts of Congress passed pursuant thereto,[15] require that all records and judicial proceedings of any state, authenticated as required by the Federal statutes, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the states from which they are taken. The Supreme Court of the United States has held that the courts need not give full faith and credit to judgments, etc., according to the effect that they had where rendered unless the law of that state is proved as a fact. Congress has not prescribed how the effect of the judgment where rendered shall be ascertained, and has left that to be regulated by the general rules of pleading and evidence applicable to the subject.[16]

Missouri courts will not take judicial notice of the statutes of a sister state in determining whether a foreign attachment suit is a bar to a subsequent action in Missouri under the full faith and credit clause, and the Supreme Court of Missouri has intimated by way of reference to the United States Supreme Court decisions that it would require the party setting up the foreign judgment to plead its effect where rendered in order to come under the full faith and credit clause.[17] The recently enacted statute,[18] requiring

11. State ex rel Stack v. Grimm, *supra*, note 10; State ex rel Dillard v. Johnson, 78 Mo. App. 569 (1898); 2 Freeman, Judgments (5th ed. 1925), sec. 1108.

12. Mo. Rev. Stat. (1929) sec. 807; State ex rel Stack v. Grimm, *supra*, note 10; State ex rel Dillard v. Johnson, *supra*, note 11.

13. Smith v. Trimble-Compton Produce Co., 222 Mo. App. 777, 9 S. W. (2d) 865 (1928); Swing v. Karges Furniture Co., 123 Mo. App. 367, 100 S. W. 662 (1907); S. C. 150 Mo. App. 574, 131 S. W. 153 (1910).

14. Art. 4, Sec. 1.

15. R. S. sec. 905, derived from 1 Stat. 122 (1790), and 2 Stat. 299 (1804); 28 U. S. C. sec. 687 (1926); 3 U. S. Compiled Stat. Anno., sec. 1519 (1916).

16. Hartford Life Ins. Co. v. Johnson, 249 U. S. 490, 39 Sup. Ct. 336, 63 L. Ed. 722 (1918); Gasquet v. Lapeyre, 242 U. S. 367, 37 Sup. Ct. 165, 61 L. Ed. 367 (1916); Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 35 Sup. Ct. 37, 59 L. Ed. 220 (1914) (effect of Illinois Statute was not pleaded here); Lloyd v. Matthews, 155 U. S. 222, 15 Sup. Ct. 70, 39 L. Ed. 128 (1894); Chicago & Alton Ry. Co. v. Wiggins Ferry Co., 119 U. S. 615, 7 Sup. Ct. 398, 30 L. Ed. 519 (1886) (effect of Statute where enacted was not pleaded); Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535 (1885).

17. Norman v. Penn. Fire Ins. Co., 237 Mo. 576, 141 S. W. 618 (1911).

18. Mo. Rev. Stat. (1929) sec. 806 (Laws of 1927, page 156).

the courts of this state to take judicial notice of the public statutes and judicial decisions of other states where the law of the other state is *pleaded*, does not simplify the pleadings. It has been held that this statute does not authorize the courts to take judicial notice of the statutes of other states not pleaded,[19] but if they are pleaded, the statutes should bring before the court the judicial construction of the statutes as interpreted by the courts of the state in which they were enacted.[20] The Supreme Court, in applying the Missouri statute on judicial notice has held that Missouri courts can not take judicial notice of the judicial decisions of another state unless they are pleaded.[21]

If the shareholder was personally served in the assessment proceeding, then it is clear that the assessment can be sued upon in another state as a personal judgment, and the foregoing rules should be followed in pleading the judgment. However, if the shareholder was not personally served in the assessment proceeding, it is equally clear that the plaintiff must plead the assessment and its effect where rendered, the same as if it were a personal judgment, in order for the judicial findings of fact to be binding upon the defendant in the same degree that they are where the assessment was rendered. If this is done, the state of the *forum* will be compelled to give the same faith and credit to these judicial findings of fact that they have where rendered. As stated in the following discussion, the judicial findings of fact may be held binding upon the shareholder, although not a party to the assessment proceedings, or to the action against the corporation by the creditor, because he is privy to the corporation. It is to be noted in this latter situation that the plaintiff is not suing upon a personal judgment, but upon the shareholder's contractual or statutory liability. He seeks to have certain facts which were adjudicated in the prior suit held *res adjudicata* because the shareholder is privy to the corporation.

The majority of the courts in this country hold that a decree assessing shareholders in an insolvent corporation is conclusive against the non-resident shareholders as to certain matters adjudicated in the suit between the corporation and the creditor, although the shareholders were not served with process within the state where the assessment was rendered, or made parties to this proceeding. That is, these assessments are held conclusive as

19. Noell v. Chicago & E. Ill. Ry. Co., 21 S. W. (2d) 937 (Mo. App. 1929). See First Nat. Bank of Mission, Texas, v. Gordon, 6 S. W. (2d) 60 (Mo. App. 1928).

20. Ramey v. Mo. Pac. Ry. Co., 323 Mo. 662, 21 S. W. (2d) 873 (1929).

21. Gorman v. St. Louis Merchants' Bridge Terminal Ry. Co., 28 S. W. (2d) 1023 (Mo. 1930). The Supreme Court said that the legislature would have to remove this archaic rule of law before the Missouri courts could take judicial notice of the statutes and judicial decisions of sister states without their being pleaded. In Haller v. Kansas City Public Service Co., 17 S. W. (2d) 392 (1929), the Kansas City Court of Appeals said that they could only take notice of the state decisions mentioned in the pleadings, because no other decisions were in evidence. The court did not refer to the Missouri statute.

to the amount, necessity, and propriety of the assessment;[22] but in a suit on an assessment the shareholder or policy holder may set up personal defenses, such as payment, extent of his stock holdings, the statute of limitations, the discharge of his claim, a set off, or that the state of the *forum* has not licensed the corporation to do business within that state and that statute has been violated.[23] The majority of the courts follow the same rule as to the conclusiveness of assessments against non-resident mutual insurance policyholders.[24]

The Missouri cases indicate that in a suit on an assessment rendered in a sister state, the decree of assessment is only *prima facie* evidence of the debt of the non-resident shareholders who were not made parties to the original suit. In all the cases in which this point has arisen, it was not necessary for the court to decide whether the assessment was conclusive or only *prima facie* evidence of the amount, necessity, and propriety of the assessment. In most of the cases a demurrer to the plaintiff's petition was sustained, and upon appeal it was held that the assessment was at least *prima facie* evidence of the debt.[25] In one case the defense of the statute of limitations was improperly allowed by the trial court and the plaintiff appealed, so that it was not necessary to decide the point under discussion.[26] In *Swing v. Karges*

22. Marin v. Augedahl, 247 U. S. 142, 38 Sup. Ct. 452, 62 L. Ed. 1038 (1918); Selig v. Hamilton, 234 U. S. 652, 34 Sup. Ct. 926, 58 L. Ed. 1518 (1913); Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749 (1912); Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163 (1907); Great Western Telegraph Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986 (1896) Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184 (1889); Lehman v. Glenn, 87 Ala. 618, 6 So. 44 (1888); Howard v. Glenn, 85 Ga. 238, 11 S. E. 610 (1890); Converse v. Ayer, 197 Mass. 443, 84 N. E. 98 (1908); Shipman v. Treadwell, 208 N. Y. 404, 102 N. E. 634 (1913); see Note (1927) 48 A. L. R. 669, for a collection of cases.

23. In most of the cases this statement is *dictum* as no personal defenses were set up, or perhaps only one personal defense was set up. But this statement has been repeated so often as part of the majority rule that it will undoubtedly be followed. Hale v. Coffin, 57 C. C. A. 528, 120 Fed. 470 (1903); Rood v. Whorton, 67 Fed. 434 (1895); Freedy v. Trimble-Compton Produce Co., 32 S. W. (2d) 147, 152 (1930 Mo. App.). Although this case holds that a decree of assessment is only *prima facie* evidence of the debt, yet it contains *dictum* to the effect that the decree does not make a prima facie case as to the personal defenses. See, also, cases cited in Note 22, *supra*.

24. Swing v. Arkadelphia Lumber Co., 90 Ark. 394, 119 S. W. 265 (1909); Swing v. Wellington, 44 Ind. App. 455, 89 N. E. 514 (1909); Lycoming Fire Ins. Co. v. Langley, 62 Md. 196 (1884); Stone v. Old Colony Street Ry. Co., 212 Mass. 459, 99 N. E. 218 (1912) Swing v. Red River Lumber Co., 105 Minn. 336, 117 N. W. 442 (1908); Swing v. Taylor & Crate, 68 W. Va. 621, 70 S. E. 373 (1911); see Note (1927) 48 A. L. R. 669, 674, for a collection of cases.

25. Freedy v. Trimble-Compton Produce Co., 32 S. W. (2d) 147 (Mo. App. 1930); Swing v. Karges Furniture Co., *supra*, note 13; Pfaff v. Gruen, 92 Mo. App. 560, 69 S. W. 405 (1902).

26. Miller v. Connor, 177 Mo. App. 630, 160 S. W. 582 (1913).

Furniture Co.,[27] the court said that it would not attempt to determine the extent to which the defendant shareholder was bound by the Ohio decree, in passing upon the sufficiency of the plaintiff's petition; but it was admitted that the great weight of authority holds that such assessments are conclusive as stated above. The Missouri cases all go back to *Pfaff v. Gruen*[28] and say that such an assessment is *prima facie* binding or at least *prima facie* binding. As was pointed out at the beginning of this discussion, the assessment method is the only one that distributes the burden equally between the shareholders, and the courts should do everything in their power to render this method more effective. The argument of the majority view, that the shareholder is privy to the corporation and is bound as to matters adjudicated in the prior suit, prevents many useless defenses from being set up and gives the receiver a convenient way to prove his case. The stockholder, or policyholder is protected because he can set up any of the personal defenses enumerated above. In Missouri, if a creditor sues a corporation for a debt and execution is issued and returned unsatisfied, then in a suit in Missouri against a shareholder to collect this debt against the corporation on the basis of his liability on the subscription contract, the judgment obtained against the corporation is conclusive evidence of the debt of the corporation in the second suit against the shareholder.[29] This is true although the shareholder was not personally served in the suit against the corporation. These decisions can only be explained on the basis of privity between the shareholder and the corporation. Thus to be consistent the Missouri courts should hold that in an action upon a foreign assessment, the assessment is conclusive as to the amount, propriety, and necessity of the assessment. It would seem that Missouri would do well to adopt the majority view.

If a receiver brings an action in Missouri based upon an assessment rendered in another state and pleads and proves the effect of the assessment where rendered, then the Missouri courts will be compelled to give the same effect to the assessment that it has where rendered. To be more specific, if a court of equity at the domicile of the corporation, State 1, levies an assessment upon all the shareholders, some of whom are residents of State 2, and the receiver then brings suit upon this assessment in State 2, the problem is fully raised. If by the law of State 1, the assessment is conclusive evidence as to the amount, propriety, and necessity of the assessment, and the receiver pleads and proves this effect of the assessment in his action in State 2 against a shareholder over whom the court in State 2 has acquired personal jurisdiction, then the courts of State 2 will be required to give the

27. *Supra*, note 13.

28. *Supra*, note 25.

29. Scott v. Barton, *supra*, note 1; Johnson v. Stebbins-Thompson Realty Co., *supra*, note 4; Nichols v. Stevens, *supra*, note 2; Coquard v. Prendergast, *supra*, note 4. But see Taylor v. Fontaine, *supra*, note 4.

same effect to the assessment that is given to it by the courts of State 1. The Supreme Court of the United States has held that this is required by the full faith and credit clause of the Federal constitution although the shareholder was not made a party to the suit in State 1.[30] A stockholder is said to be so far an integral part of the corporation that he is privy to the proceedings touching the body of which he is a member, thus lack of personal service or the fact that he was not a party to the proceedings makes no difference.

Although the Missouri courts may be compelled to hold that assessments rendered in other states are conclusive upon shareholders when their effect is properly alleged and proved, it is clear that Missouri by statute or court decision can limit the effect of assessments as they see fit when such assessments are rendered in Missouri, or when the effect of a foreign assessment is not pleaded and proved.

The recently decided case of *Freedy v. Trimble-Compton Produce Co.*[31] suggested the substance of the foregoing. In that case the defendant held successive policies of automobile insurance, from 1917 to 1922, in a mutual insurance company of Wisconsin, the last of which expired February 18, 1922. The policies imposed a liability upon the defendant to bear its ratable proportion of the claims and expenses incurred during each year of membership not provided for by the funds of the company, this liability being in addition to a fixed premium. On April 1, 1922, after the defendant ceased to be a member, the circuit court of Milwaukee County, Wisconsin, vested title to all the assets of the company in the Wisconsin commissioner of insurance, and he was ordered to liquidate the company. On October 30, 1923, the court entered a decree of assessment, and the defendant was assessed $253.61 on the policies it held from 1917 to 1922. The commissioner then instituted an action in Missouri to collect the assessment. He pleaded the Wisconsin statutes giving the Wisconsin court authority to make the assessments and the statutes vesting the property of the corporation in the receiver and giving him the right to sue upon all the claims of the defunct company. He then pleaded the proceedings of the Wisconsin court in making the assessments, the amount of the assessments and their total. The petition also alleged that "said assessment for said amounts remains a final and binding judgment against the defendant and is herein sued for as such." But the receiver failed to plead whether the assessment by the law of Wisconsin was *prima facie* or conclusive evidence of the amount, necessity, and propriety of the assessment. The trial court sustained a demurrer to the petition, and the plaintiff appealed from this ruling. On appeal, a majority of the Kansas City Court of Appeals held that the petition stated a cause

30. Marin v. Augedahl, 247 U. S. 142, 38 Sup. Ct. 452, 62 L. Ed. 1038 (1918); Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749 (1912).

31. 32 S. W. (2d) 147 (1930 Mo. App.).

of action. The majority said: "The allegation in the amended statement that a foreign judgment is the cause of action must be disregarded, since the pleaded facts show that no judgment was rendered or attempted to be rendered by the Wisconsin court against the defendant, and that court had no jurisdiction to render a final judgment against defendant in an action to which the defendant was not a party." The majority regarded the pleaded cause of action "as one based upon a contract of insurance for the recovery of the defendant's proportionate contribution of losses." The dissenting judge held that the petition stated a cause of action upon a judgment, and that the judgment was void as the defendant was not a party to the assessment proceeding. The case was certified to the Supreme Court.

In determining whether the petition states a cause of action, the Supreme Court will not be required to decide whether the Wisconsin assessment is conclusive or only *prima facie* evidence of the amount, necessity and propriety of the assessment. If the Supreme Court adopts the dissenting opinion of the Court of Appeals and construes the petition as stating a cause of action upon a personal judgment, clearly it will be required to hold that the plaintiff failed to state a cause of action, for the Wisconsin court had no jurisdiction over the defendant by consent or service of process. A personal judgment against a defendant over whom the court rendering it had no jurisdiction is void for all purposes.[32] If the Supreme Court agrees with the majority of the Court of Appeals, and adopts a liberal construction of the petition, it can say that the assessment is at least *prima facie* evidence of the plaintiff's claim, without deciding whether the assessment is conclusive evidence of the amount, necessity and propriety of the assessment. As stated above, the full faith and credit clause of the Federal Constitution does not require the courts of other states to recognize the Wisconsin assessment as conclusive evidence of the amount, necessity and propriety of the assessment,

32. Wilson v. Seligman, 144 U. S. 41, 12 Sup. Ct. 541, 36 L. Ed. 338 (1892); Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237 (1878); Pennoyer v. Neff, 95 U. S. 714, 24 L. E. Ed. 565 (1877); Bonnet-Brown Sales Service v. Utt, 323 Mo. 589, 19 S. W. (2d) 888 (1929); Palmer v. Bank of Sturgeon, 281 Mo. 72, 218 S. W. 873 (1920); Givens v. Harlow, 251 Mo. 231, 158 S. W. 355 (1913); Ellison v. Martin, 53 Mo. 575 (1873); Marx v. Fore, 51 Mo. 69 (1872), 11 Am. R. 432; Abbott v. Sheppard, 44 Mo. 273 (1869); Latimer v. Union Pac. Ry. Co., 43 Mo. 105, 97 Am. Dec. 378 (1868); Smith v. McCutchen, 38 Mo. 415 (1861); Gillett v. Camp, 23 Mo. 375 (1856); Sallee v. Hays, 3 Mo. 116 (1832); Wilson v. Gibson, 214 Mo. App. 219, 259 S. W. 491 (1924); Payne v. Brooke, 217 S. W. 595 (Mo. App. 1920); Elvins v. Elvins, 176 Mo. App. 645, 159 S. W. 746 (1913); Hedrix v. Hedrix, 103 Mo. App. 40, 77 S. W. 495 (1903); Smith v. Kander, 85 Mo. App. 33 (1900); Rentschler v. Jamison, 6 Mo. App. 135 (1878). See, Stuart v. Dickinson, 290 Mo. 516, 546, 235 S. W. 446 (1921); State ex rel. McIndoe v. Blair, 238 Mo. 132, 142 S. W. 326 (1911); Wilson v. St. L. & S. F. Ry. Co., 108 Mo. 588, 18 S. W. 286 (1891); Barlow v. Steel, 65 Mo. 611 (1877); State ex rel. Wallace v. Summers, 222 Mo. App. 782, 9 S. W. (2d) 867 (1928). Conflict of Laws Restatement (Am. L. Inst.) sec. 79; Commentaries on Conflict of Laws Restatement (Am. L. Inst.) sec. 79.

unless the defendant is privy to the corporation and the plaintiff pleads and proves that the assessment is conclusive as to such matters where rendered. In the principal case the plaintiff did not plead the effect of the assessment in Wisconsin. In such a case the courts of other states can limit the effect of the assessment as they see fit because no Federal question is presented.

This case involves another difficulty not discussed above. As previously stated, a shareholder or mutual policy holder is not bound as to matters adjudicated in the assessment proceeding unless he is privy to the corporation at the time of the assessment. In the principal case the defendant ceased to be a policy holder before the Wisconsin court made the assessment against him, and there may be some doubt as to whether the defendant was privy to the corporation at the time of the assessment. The contract of insurance provided that the assessment by the board of directors should be final and conclusive, and that the insured should be liable for his ratable proportion of the claims and expenses incurred during each year of membership not provided by the funds of the company. Commissioner Barnett, in the opinion adopted by Judge Bland, very ably argues that the privity between the insured and the company continued after the policy had expired.[33] Some courts hold that when the policy expires, the membership ceases, and the corporation is no longer authorized to represent the policy holder in court.[34] Other courts seem to assume that the membership continues for the purpose of assessment even after the policy expires, although they do not expressly say so.[35] The view that the privity between the insured and the company continues seems to reach a desirable result, in that it makes it easier for a commissioner or receiver to collect assessments against foreign policy holders, without making the trouble and expense of the proceedings prohibitive.

Paul G. Ochterbeck*

TRUSTS—AN ADMINISTRATOR AS A TRUSTEE

Advance Exchange Bank v Baldwin[1]

In the case of *Advance Exchange Bank v. Baldwin*, the commissioner of finance of the state of Missouri, in charge of the Advance Exchange Bank which had been declared insolvent, brought suit on a promissory note. The defendant set up as a counterclaim that his mother had died in Illinois, leaving property but no debts in Missouri; that among the property in Missouri was

33. 32 S. W. (2d) 147, 152 (Mo. App. 1930).

34. Commonwealth Mutual Fire Ins. Co. v. Hayden, 60 Nebr. 636, 83 N. W. 922 (1900)

35. Swing v. Wellington, 44 Ind. App. 455, 89 N. E. 514 (1909); Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207 (1898); Swing v. Red River Lumber Co., 105 Minn. 336, 117 N. W. 442 (1908). *Cf.* Selig v. Hamilton, *supra*, note 22.

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1. 31 S. W. (2nd) 96 (1930).

a deposit in the insolvent bank in the name of Carstarphen, as Administrator; that administration was had in Missouri for the sole purpose of complying with the state's inheritance tax laws; that defendant as sole legatee was entitled to set off this deposit against the note. The court in permitting the set off went on to say that "the legal title to the deposit was in the administrator, but he held only as trustee for the defendant in whom was vested the equitable title."

The result of the case seems right, and to that extent the language adopted by the court may be justified. But to the extent that the use of such language may lead to confusion and improper decisions in other cases, it is not justified. Nor would the fact that many cases[2] contain the same and similar language lend strength to the erroneous terminology. And to prevent this confusion and the possible miscarriage of justice that might result, the following discussion is offered.

Estates were formerly administered in courts of equity.[3] It is easy to understand why the Chancellor took jurisdiction in the administration of estates of deceased persons. Not only was the equitable relief more complete and better provision made for the rights of all parties, but the administration of an estate was closely analogous to the theory of trusts. The relation between the administrator and legatees and creditors in many ways resembled the relation between the trustee and the cestui que trust. Equity alone has always had the power to enforce a trust, and so this jurisdiction over the administration of estates soon became firmly established and exclusive. Under such conditions it would not seem to be error to denominate the administrator a trustee and the legatee's interest as being equitable. But in the great majority of states this field of equity jurisdiction has been transferred to the Probate Court by statute.[4] In some instances the equity jurisdiction was abolished;[5] in others, it was left standing, theoretically, and if it exists at all it is only supplementary and not concurrent;[6] and in the rest it still exists and is concurrent.[7] The Probate Court being a statutory court is a law court whose jurisdiction in most states is clearly defined by statute. Bearing this in mind, it seems a mistake any longer to use the language quoted from the present case.

But aside from this change in the jurisdiction over the administration

2. State ex. rel. Buder v. Brand, 305 Mo. 321, 265 S. W. 989 (1924); State ex. rel. v. Dickson, 213 Mo. 66, 111 S. W. 817 (1908); Bell v. Farmers & Traders Bank, 188 Mo. App. 383, 174 S. W. 196 (1915); McCracken v. MacCaslin, 50 Mo. App. 85 (1892); Bettendorf v. Bettendorf, 190 Ia. 83, 179 N. W. 444 (1920); Ramsey v. VanMeter, 300 Ill. 193, 133 N. E. 193 (1921); Pierce v. Holzer, 65 Mich. 263, 32 N. W. 431 (1887); In re Hibbler's Estate, 78 N. J. Eq. 217, 78 A. 188 (1910).

3. 1 Pomroy Eq. Jur. (4th ed.) sec. 156.

4. Art. VI, Sec. 34, Constitution of Missouri.

5. 1 Pomroy Eq. Jur. (4th ed.) sec. 348.

6. 1 Pomroy Eq. Jur. (4th ed.) sec. 349.

7. 1 Pomroy Eq. Jur. (4th ed.) sec. 350.

of personal estates, other reasons deter one from calling the administrator a trustee. In many respects the positions of trustees and administrators are similar. Both hold the legal title to the property,[8] the beneficial interest being vested in someone else. Both occupy a fiduciary relation and are held to a high degree of care.[9] But at that point the similarity ceases and we note many differences. A trustee holds as long as the settler said or meant him so to hold; the administrator, only as long as is necessary to wind up the estate. The holding of the trustee is not adverse to that of the cestui. The administrator represents the testator and stands in his place, and his holding is adverse to the cestui in so far as he may find it necessary to apply all or part of the legatee's interest toward the payment of debts of the estate. The duties of the administrator pertain to the office. His business is to wind up the estate as soon as possible.[10] The duties of the trustee relate to the person and he is permitted to exercise a much broader discretion in managing the trust property.

The present case not only calls the administrator a trustee, but it speaks of the interest of the legatee as being equitable. This is borne out to a certain extent by the cases holding that the statute of limitations does not bar the legacy.[11] But the legatee's interest is legal in that it is subject to garnishment after the settlement of the estate,[12] and is within the prohibition of the statutes dealing with restraints on alienation of legal interests.[13] Since the legacy is now recoverable in the Probate Court it would seem to be a legal interest.[14] From the broad language of the cases the so-termed trustee-cestui relationship would be extended so as to include the creditors of the estate.[15] Then there are two classes of cestuis interested in the trust property. The claims are adverse and payment to the creditors may operate to defeat the interest of the legatee. If the administrator is trustee of the estate for the creditors, then carrying that to its logical conclusion, the creditor's interest would be equitable.

In a trust it is said that there must be a specific trust *res*. No specific

8. Green v. Tittman, 124 Mo. 372, 27 S. W. 391 (1894); Leaky v. Maupin, 10 Mo. 373 (1847). But see Richardson v. Cole, 160 Mo. 372, 61 S. W. 182 (1900); Bell v. Farmers & Traders Bank, supra note 2; McCracken v. McCaslin, supra note 2.

9. State ex rel. v. Dickson, supra note 2; Bettendorf v. Bettendorf, supra note 2; Stewart v. Baldwin, 86 Wash. 63, 149 Pac. 662 (1915).

10. Greenland v. Waddell, 116 N. Y. 234, 22 N. E. 367 (1887).

11. 18 Am. & Eng. Ency. Law, (2nd ed.) 803-805. But see State ex rel. Yeoman v. Hoshaw, 86 Mo. 193 (1885); Tapley et al., Adm'rs of Tapley v. McPike, 50 Mo. 589 (1872); State to use of Coleman v. Willi, 46 Mo. 236 (1870); Johnson v. Smith's Adm., 27 Mo. 591 (1859); State to use v. Blackwell, 20 Mo. 97 (1854).

12. 2 Corpus Juris 77.

13. Lathrop v. Merrill et al., 207 Mass. 6, 92 N. E. 1019 (1910).

14. 24 MICH. LAW REV. 826; 36 YALE LAW JOUR. 272.

15. State ex. rel. Buder v. Brand, supra note 2; Bell v. Farmers & Traders Bank, supra note 2; Ramsey v. VanMeter, supra note 2; In re Hibbler's Estate, supra note 2.

trust *res* can be found in the case of a general legacy. As to a specific legacy this difficulty might not exist, but even then there is still present the possibility that the entire estate may be needed to staisfy the claims of creditors. If then we adopt the language of the present case and follow it out to its logical conclusion, we are forced to say that in this kind of a trust no specific trust *res* is necessary.

The administrator occupies a fiduciary relation. He holds the legal title. The legatee has an interest in the property held by the administrator. So it may be that a kind of "legal trust" exists and it is possible that this is what the courts mean.[16] Calling it a "legal trust" would obviate the necessity of changing our views with regard to trusts. Or the situation could be disposed of by saying that the administrator-legatee relationship is a distinct one, separate and different from any other, even though it bears a close resemblance to that of trustee and cestui. A treatment of the cases under either of these suggested views would lead to the same result as that reached in the present case, and at the same time avoid the confusion that always results from the use of loose language.

Amos H. Eblen*

CONFLICT OF LAWS—VOLUNTARY PAYMENT OF DEBT TO FOREIGN REPRESENTATIVES—SITUS OF CORPORATE STOCK FOR ADMINISTRATIVE PURPOSES—

Lohman v. *Kansas City Southern Ry. Co.*[1]

Assume that D died domiciled in New York, and A is appointed administrator in that state. Assume also that D had a debtor residing in Missouri. Can A maintain an action in Missouri to collect the claim from the debtor? Is the debtor protected from further liability if he voluntarily pays A? In a previous number of the Law Series, University of Missouri Bulletin,[2] Mr. Robert B. Fizzell gave us an exhaustive discussion of these problems. While there is not much to be added to his treatment of the subject, three recent decisions of the Supreme Court of Missouri should be considered in this connection.

The first question stated above must be answered in the negative. Al-

16. This explanation is strengthened by the holding that the statute of limitations begins to run in favor of the administrator after the final order of distribution has been made. See State ex rel. Yeoman v. Hoshaw, supra note 11; Tapley et al., Adm'rs of Tapley v. McPike, supra note 11; State to use of Coleman v. Willi, supra note 11; Johnson v. Smith's Adm., supra note 11; State to use v. Blackwell, supra note 11.

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1. 33 S. W. (2d) 112 (Mo. 1930). See also companion cases cited in notes 33 and 34 *infra*.

2. (1920) 18 Law Series, Univ. of Mo. Bull. 3.

though administration may be had where the decedent was domiciled,[3] it is clear that assets left in a state at the death of the owner are subject to the control of that state, and an ancillary representative may be appointed in any state where there are assets, regardless of the domicil of the decedent.[4] Debts due the decedent from Missouri debtors are regarded as assets in Missouri.[5] Every representative has the right and power to collect in the state of his appointment a claim from any debtor within the state.[6] The power of any representative to collect within his own state is inconsistent with the view expressed by some writers and courts that the domiciliary representative has title to all assets, including all choses in action of the decedent.[7] The appointment of a personal representative is in general of no effect outside the state where he is appointed. It is settled in most jurisdictions that a representative cannot maintain an action to collect assets outside the state in which he qualifies.[8] It follows, therefore, that A, the domiciliary representative in

3. It has been held that unless a statute requires it, the presence within the domiciliary state of assets owned by the decedent is not essential. Watson v. Collins' Admr. 37 Ala. 587 (1861); Connors v. Cunard S. S. Co., 204 Mass. 310, 90 N. E. 601, 26 L. R. A. (N. S.) 171 (1909). See note L. R. A. 1915 D 856. See also Mo. Rev. Stat. (1929) Sec. 2.

4. Mo. Rev. Stat. (1929) Sec. 254 *et seq.*; Richardson v. Busch, 198 Mo. 175, 95 S. W. 894 (1906); Turner v. Campbell 124 Mo. App. 133, 101 S. W. 119 (1907). The general question of the *situs* of property for administration purposes is beyond the scope of this note, which is limited, in this connection, to a consideration of the *situs* of debts and corporate stock.

5. In The Matter of Partnership Estate of Henry Amoo & Co., 52 Mo. 290 (1873); McCarty v. Hall, 13 Mo. 480 (1850); Beeraft v. Lewis, 41 Mo. App. 546 (1890). Likewise a foreign judgment against a person now a resident of Missouri, has upon the death of the plaintiff a *situs* in this state for the purposes of administration. Miller v. Hoover, 121 Mo. App. 568, 97 S. W. 210 (1906). Discussion of this case in Note (1907) 20 Harv. L. Rev. 326. For collection of authorities see Note L. R. A. 1915 D 856.

6. Equitable Life Soc. v. Vogel, 76 Ala. 441 (1884); Stevens v. Gaylord, 11 Mass. 256 (1814). See also Wilkins v. Ellet, 108 U. S. 256, 2 S. Ct. 641, 27 L. Ed. 718 (1883); Harper v. Butler, 2 Pet. 239 (U. S. 1829).

7. For a criticism of the view that the domiciliary representative has title to all assets everywhere, see, Beale, *Voluntary Payment to a Foreign Administrator* (1929) 42 Harv. L. Rev. 597.

8. Gregory v. McCormick, 120 Mo. 657, 25 S. W. 565 (1895); Cabanne v. Skinner, 56 Mo. 357 (1874); Naylor's Admr. v. Moffatt, 29 Mo. 126 (1859); Miller v. Hoover, *supra* note 5; Sommer v. Franklin Bank, 108 Mo. App. 490, 83 S. W. 1025 (1904). But if defendant fails to object to prosecution of the suit he waives the objection. Beattie Mfg. Co. v. Gerardi, 214 S. W. 189 (Mo. 1919); May v. Burk, 80 Mo. 675 (1873). The foreign domiciliary representative can maintain an action in Missouri upon a judgment secured by him in his representative capacity in another state, the judgment debtor having moved to this state. Tittman v. Thornton, 107 Mo. 500, 17 S. W. 979 (1891); Hall v. Harrison, 21 Mo. 227 (1855). Foreign representative can sue on contract made in his representative capacity. Abbott, Admr. v. Miller, Admr., 10 Mo. 141 (1846); Wolf v. Sun Ins. Co., 75 Mo. App. 306 (1898). See also Mo. Rev. Stat. (1929) Sec. 706.

the case stated above, cannot maintain an action in Missouri to collect the debt.

Is the debtor protected from further liability if he voluntarily pays A? According to the great weight of authority, a voluntary payment made to a foreign domiciliary representative is, in the absence of local creditors and a local ancillary representative, a valid discharge to the debtor.[9] These cases are consistent with the view that the domiciliary representative owns all claims due the deceased. The same result has been reached, however, where the debtor paid a foreign ancillary representative.[10] It has been held in some cases where there had already been a local representative appointed, that payment to the foreign domiciliary representative is a valid discharge to the debtor, if the payment was made in good faith and in ignorance of the appointment.[11] But if local creditors are prejudiced, it is usually held that the debtor is not discharged, though no local administrator had been appointed at the time of payment.[12] These authorities require no reference to the idea that the domiciliary representative owns all claims everywhere. The correct explanation seems to be that it is inconvenient to have administration in every state where a debtor may be found. If a debtor has paid a duly appointed foreign representative, who must account to the proper parties for the money received, it is unjust to compel the debtor to pay the local representative, unless there are local creditors to be protected.[13] It is no answer to say that a second payment is necessary to protect possible local creditors. Until it appears that there are local creditors there is no reason for requiring a second payment.[14]

While the Missouri decisions on this point are not in accord, they incline to the view that payment to a foreign representative does not constitute a discharge of the debt.[15] It has been said that this view is justified

9. Bull v. Fuller, 78 Iowa 20, 42 N. W. 572 (1889); Ames v. Citizens National Bank, 181 Pac. 564 (Kan. 1919); Fidelity Trust Co. v. Williams, 32 Ky. L. R. 303, 105 S. W. 952 (1907); Citizens Nat. Bank v. Sharp, Admr., 53 Md. 521 (1880); Gardner v. Thorndike, 183 Mass. 81, 66 N. E. 633 (1903); In re Washburn's Estate, 45 Minn. 242, 47 N. W. 790 (1891). Full collection of decisions will be found in Note (1921) 10 A. L. R. 276.

10. Wilkins v. Ellet, *supra* note 6; Morrison v. Berkshire Loan and Trust Co., 229 Mass. 519, 118 N. E. 895 (1918). *Contra*, Wolfe v. Bank of Anderson, 123 S. C. 208, 116 S. E. 451 (1922).

11. Compton v. Borderland Coal Co., 179 Ky. 695, 201 S. W. 20 (1918); Maas v. German Savings Bank, 176 N. Y. 377, 68 N. E. 658 (1903).

12. Ferguson v. Morriss, 67 Ala. 389 (1880); Jones v. Jones, 39 S. C. 247, 17 S. E. 587 (1872); Wolfe v. Bank of Anderson, *supra* note 10.

13. Beale, *op. cit. supra* note 7 at p. 605.

14. Goodrich on Conflict of Laws, pp. 414-15.

15. Troll v. Third Nat. Bank of St. Louis, 278 Mo. 74, 211 S. W. 545 (1919); Troll v. Third Nat. Bank, 216 S. W. 922 (Mo. 1919); Troll v. United Railways Co., 216 S. W. 923 (Mo. 1919); Troll v. Nat. Bank of Commerce, 216 S. W. 923 (Mo. 1919); Bartlett v. Hyde, 3 Mo. 490 (1834); Troll v. Landgraf, 183 Mo. App. 251, 168 S. W. 268 (1914); Crohn

by the duty which a state owes local creditors.[16] But the same result has been reached where it did not appear that there were any local creditors.[17]

The three recent cases mentioned above are of interest in this connection. In the first case of *Lohman* v. *Kansas City Southern Ry. Co.*,[18] the decedent was a resident of and died in New York. At the time of his death he owned stock in a Missouri corporation and had the stock certificates in his possession in New York. An executor was appointed in New York, who took possession of the certificates. The corporation maintained a transfer office in New York, and upon demand, the corporation transferred the stock to the New York executor, having no notice of any claim by an ancillary administrator in Missouri. Subsequently, plaintiff was appointed ancillary administrator in Missouri where he brought an action to require the corporation to issue him certificates of stock in lieu of the certificates held by the decedent and to account for dividends on such stock since the death of the owner. It was admitted by the pleadings that there were no creditors, legatees or heirs in Missouri and that no taxes were due the state. It was held that the defendant's motion for judgment on the pleadings was properly sustained.

It has been suggested that there are three possibilities in determining the *situs* of corporate stock for the purposes of administration.[19] (1) At the domicil of the corporation. This view represents the weight of authority and various reasons have been given to justify it.[20] (2) At the domicil of the owner. A

v. Clay County State Bank, 137 Mo. App. 712, 118 S. W. 498 (1909). It has been held, however, that if a nonresident dies leaving no creditors in Missouri, a local creditor can safely pay the heirs or distributees of the estate. Bell v. Farmers & Traders Bank, 188 Mo. App. 383, 174 S. W. 196 (1915). Mr. Fizzell's article, *supra* note 2, contains a careful analysis of all the Missouri decisions rendered prior to the publication of that article.

16. Crohn v. Clay County State Bank, 137 Mo. App. 712, 715, 118 S. W. 498, 499 (1909).

17. Troll v. Third Nat. Bank of St. Louis, Crohn v. Clay County State Bank, both *supra* note 15. See Richardson v. Busch, *supra* note 4; Becraft v. Lewis, *supra* note 5.

18. *Supra* note 1.

19. Goodrich, *Problems of Foreign Administration* (1926) 39 Harv. L. Rev. 797, at 805.

20. Troll v. Third Nat. Bank of St. Louis, *supra* note 15; Richardon v. Busch, *supra* note 4; Hoglan v. Moore, 219 Ala. 497, 122 So. 824 (1929); Warrior Coal & Coke Co. et al. v. National Bank of Augusta, Ga., 53 So. 797 (Ala. 1910); Grayson v. Robertson, 122 Ala. 330, 25 So. 229 (1899); Murphy v. Crouse, 135 Cal. 14, 66 Pac. 971 (1901); Harris v. Chicago Title and Trust Co., 338 Ill. 245, 170 N. E. 285 (1930); Martin v. Central Trust Co. of Ill., 327 Ill. 622, 159 N. E. 312 (1927); Black Eagle Mining Co. v. Conroy et al., 94 Okla. 199, 221 Pac. 425 (1923); In re Arnold, 99 N. Y. S. 740, 114 App. Div. 244 (1906); In re Fitch's Estate, 160 N. Y. 87, 54 N. E. 701 (1899); Gamble v. Dawson, 67 Wash. 72, 120 Pac. 1060 (1912), Ann. Cas. 1913 D 501, 5 Thompson, Corporations, (3rd Ed. 1927) Sec. 3482. In Modern Woodmen of America v. Mixer, 267 U. S. 544, 551, 45 Sup. Ct. 389, 69 L. Ed. 783 (1925), Mr. Justice Holmes said, "The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to the domicil,

few jurisdictions follow this view,[21] upon the ground that the *situs* of personalty is at the domicil of the owner. "A rule not true as a matter of fact or of legal doctrine."[22] (3) At the location of the certificate. This view merely illustrates the modern mercantile doctrine that a certificate of stock is more like a chattel than a chose in action,[23] a doctrine sanctioned by the recent decision of the United States Supreme Court cited in the *Lohman Case*. It has been held that an administrator having a certificate of stock in a foreign corporation may transfer it,[24] and that a share of stock in a foreign corporation may be attached in a state where the certificate is located even though the owner is a nonresident.[25]

The mercantile doctrine would seem to be in *accord* with the policy of the Uniform Stock Transfer Act.[26] The effect of this act is to make a certificate of stock as nearly as possible representative of the shares, which is in accordance with general mercantile usage.[27] It may be objected that this view would give the stock a dual *situs*, *i.e.* at the domicil of the corporation and where the certificate is located. But the term *situs*, as used in this connection, means jurisdiction for certain purposes, and does not refer to the physical location of the property. It may also be objected that to give a share a *situs* with the certificate might result in conflicts, if two states acted on the same share. It has been pointed out, however, that comity is the basis of the recognition of the *situs* of the share with the certificate, and that this same comity

membership looks to and must be governed by the law of the state granting the incorporation." It has been pointed out that the proper view would seem to be that the consensual relation of the parties has given rise to a chose in action of such a nature that in suits regarding its ownership it may be considered as property in the nature of a *res* existing at the domicil of the corporation; Goodrich, *op. cit.*, *supra* note 19, at page 806.

21. Russell v. Hooker, 67 Conn. 24, 34 Atl. 711 (1895); In re Miller's Estate, 90 Kan. 819, 136 Pac. 255 (1913), L. R. A. 1915 D 856; Luce v. Manchester & Lawrence R. Co., 63 N. H. 588, 3 Atl. 618 (1886).

22. Goodrich, *op. cit. supra* note 19, at page 806.

23. See Puget Sound Nat. Bank v. Mather, 60 Minn. 362, 62 N. W. 396 (1895); Simpson v. Jersey City Contracting Co., 165 N. Y. 193, 58 N. E. 896 (1900). See also Note (1926) 39 Harv. L. Rev. 485; Note (1927) 25 Mich. L. Rev. 447 and cases cited by court in Lohman v. Kansas City Southern Ry. Co., *supra* note 1.

24. Union Transit Co. v. Pac. Tel. Co., 31 Cal. App. 641, 159 Pac. 820 (1916); Luce v. Manchester & Lawrence R. Co., *supra* note 21.

25. Simpson v. Jersey City Contracting Co., *supra* note 23. This case discussed and authorities collected in Note (1902) 55 L. R. A. 796.

26. For full draft of this act see Terry, Uniform State Laws Annotated, p. 341. The act has been adopted by the following states: Connecticut, Illinois, Louisiana, Maryland, Mississippi, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee Wisconsin, South Dakota and Alaska.

27. Terry, *op. cit.*, *supra*, note 26.

should lead states to respect each other's jurisdiction so that prior action by one state will prevent action in the other.[28]

The authorities, however, are not unanimous. Prior to the decision in the *Lohman Case*, the Supreme Court of Missouri regarded a certificate of stock as mere evidence of ownership. In *Armour Bros. Banking Co.* v. *St. Louis National Bank*,[29] it was held that shares of stock in a foreign corporation cannot be subjected to attachment by seizure of the certificates in Missouri. In *Richardson* v. *Busch*, [30] the certificates of stock in a New York corporation were in Missouri at the time of the non-resident owner's death, and it was held that Missouri had no jurisdiction over the stock for the purposes of administration. In *Troll* v. *Third National Bank of St. Louis*, [31] referred to in the *Lohman Case*, the public administrator of St. Louis County filed a petition alleging that the decedent, a resident of Illinois, died owning shares of stock in a Missouri bank, the stock certificate being in the possession of the executrix in Illinois; that plaintiff, as ancillary administrator appointed in Missouri, had title to the stock and was entitled to all dividends declared thereon since the death of the stockholder. Plaintiff prayed that defendant bank be ordered to deliver to plaintiff a certificate for the stock, and to pay to the plaintiff all dividends declared since the owner's death. The Supreme Court held that the demurrer should be overruled.

It will be noted, however, that in *Lohman* v. *Kansas City Southern Ry. Co.*, the court rejected the view expressed in *Richardson* v. *Busch* and the *Troll Case* that a share of stock can have no *situs* at any other place than the corporate domicil. The court said: "The certificate of stock held by Upmann [the decedent] must therefore be regarded as having the character of personal property in themselves and a *situs* for some purposes in the state of New York". This does not mean that a state must exercise jurisdiction over stock when the certificates are left within the state, and hence *Richardson* v. *Busch* was not necessarily overruled.

Although it was said in the *Lohman Case* that the court had "much doubt concerning the correctness of the ruling in the Troll Case", that case was not expressly overruled. The court distinguished the *Troll Case* upon the ground that in the *Lohman Case* the corporation kept the transfer books in New York and the stock was transferred to the New York representative before notice of any claim by the ancillary administrator. If it was neces-

28. This objection was stated and answered in Direction Der Disconto-Gesellschaft v. United States Steel Corp., 267 U. S. 22, 45 S. Ct. 207, 69 L. Ed. 495 (1924), cited in Lohman v. Kansas City Southern Ry. Co., *supra* note 1. See also Note (1926) 39 Harv. L. Rev. 485, 489.

29. 113 Mo. 12, 20 S. W. 690 (1892).

30. *Supra* note 4.

31. Troll v. Third Nat. Bank of St. Louis; Troll v. Third Nat. Bank; Troll v. United Railways Co.; Troll v. Nat. Bank of Commerce, all *supra* note 15.

sary to decide whether the stock had a *situs* in New York, it would seem that the presence of the certificates in that state was the important thing, rather than the presence of the transfer books.[32] But in the case of a *voluntary* transfer of stock to a foreign representative, the fact that the transfer was made before notice of any claim by a local ancillary representative may be important. In the *Troll Case* the stock had not been transferred to the foreign representative. The principles of comity did not require the Missouri court to recognize a prior voluntary transfer, nor was the court called upon to recognize any prior action by the state where the certificates were located. It would seem, therefore, that the *Troll Case* may be justified without holding that a share of stock can have no *situs* at any other place than in the corporate domicil. Even under the facts of the *Troll Case* administration in Missouri would seem to be unnecessary unless there are local creditors. But the principles of comity should lead the Missouri courts to respect the prior voluntary transfer of the stock in New York, if local creditors are not prejudiced. This was done in the *Lohman Case* and it is submitted that the result is desirable.

There remains the question as to whether this decision overruled the earlier Missouri decisions which incline to the view that a voluntary payment of a debt to a foreign representative does not discharge the debt. It may be argued that since the court did not distinguish between the stock and the dividends, the rulings in the cases which would require a second payment to the local administrator were, therefore, tacitly overruled. There are two answers to this argument. First, it does not appear that any dividends had been paid to the New York representative. Second, the court decided that the Missouri administrator was not entitled to the stock, and it follows that he could not recover any dividends declared thereon. It will be remembered that in the earlier Missouri cases dealing with the payment of simple contract debts to foreign representatives, the fact that there were no local creditors did not influence the courts. In the *Lohman Case* the supreme court seemed to adopt the view that in the absence of local creditors, local ancillary administration is unnecessary. It is clear, however, that the court was influenced by the fact that the transfer of the stock was made in New York where the certificates were located and it remains to be seen whether the absence of local creditors will be deemed important in future cases dealing with payment of debts to foreign representatives.

In *Lohman* v. *Kansas City Southern Ry. Co.*,[33] a companion case to the

32. "The defendant corporation by the establishment of a stock transfer office here has become pro tanto domiciled in this state. . . . .Does not this fact constitute New York the domicil of the corporation to some extent at least. . . .so far as the registry and transfer of shares therein is concerned? We think it does." Willard Bartlett, J. in Lockwood v. U. S. Steel Corp., 209 N. Y. 375, 385, 103 N. E. 697, 700 (1913), L. R. A. 1915 C 471.

33. 33 S. W. (2d) 117 (Mo. 1930).

Lohman Case discussed above, the facts are identical with those of the first case, except that in the second case the Missouri administrator's demand upon the defendant was made *before* the defendant had transferred the stock on its books in New York, and it refused to make the transfer to the New York representative. Thereupon, the New York representative brought suit against the defendant in New York. Judgment was given against the defendant and the stock was transferred to the New York representative. Subsequently the Missouri ancillary administrator brought suit in Missouri against the defendant as in the first case. The court held for the defendant. A third companion case is in *accord* with the second case.[34]

In the last two cases the transfer of the stock was not made *voluntarily*, as it was in the first *Lohman Case*. No Missouri decision has been found where a voluntary transfer of stock was made after notice of the ancillary administrator's claim. In the second case the court said that the New York court had before it both the stock and the defendant, and under the full faith and credit clause of the Federal Constitution it was the court's "duty" to recognize the New York judgment. In the third case the court referred to the New York judgment as "valid and binding." On the other hand, the opinion in the second case indicates that this would be true only when, as here, there are no unpaid debts or taxes in this state. The last two decisions may be explained, however, upon the principles of comity discussed above, without saying that the Missouri court was required to give full faith and credit to the New York judgment. This explanation leaves open the question as to whether the Missouri courts would be required to recognize the New York judgment, and the question of what bearing the existence of creditors in Missouri would have upon the problem. No other decisions have been found on this point.

Rex H. Moore.*

WHAT CONSTITUTES CONSTRUCTIVE EVICTION BY A LANDLORD

Muehling et al. v. *Juvenile Shoe Corporation.*[1]

This was an action for rent, in which the defendant corporation claimed that it had been constructively evicted. The case was tried without a jury, and judgment given for the plaintiffs. The acts complained of were the plaintiffs' placing a large number of beer cases in the building, putting a padlock on one of the doors of the building, and permitting another party to make changes in an outside shed and store his automobile therein. At the trial the plaintiffs admitted placing the beer cases in the building and putting the

34. Lohman v. Kansas City Southern Ry. Co. et al., 33 S. W. (2d) 118 (Mo. 1930).

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1. 8 S. W. (2d) 937 (Mo. App. 1928).

lock on the door, adducing testimony to show that at the time of doing the said acts the defendant had practically vacated the premises, having moved out all the fixtures. Further, the plaintiffs denied any intention to dispossess the tenant, explaining that the beer cases were placed in the building to prevent a raise in the insurance rate, and that the lock was put on the door to protect property within from burglary. They also denied permitting a change in, or use of, the outside shed, asserting that the party who used it had no permission from them to do so. The court, in refusing to reverse the judgment, quite properly held that, viewing the evidence in its most favorable light to the respondents, there was not a constructive eviction, for there was no intention to evict, no abandonment of the premises because of the acts of the landlord, and no substantial interference with the defendant's use of the premises.[2]

It was early held that if the landlord forcibly expelled his tenant from the whole of the premises no action would lie for the rent, the consideration therefor having failed.[3] The justice and principle of this result was unquestioned and it became the established law. But the situation where the tenant was not physically and forcibly evicted, but nevertheless, was forced to vacate the leasehold because of the landlord's interference with his quiet enjoyment, remained uncared for until a New York Court[4] decided that such interference was analogous to a forcible expulsion and should have the same effect, namely, to suspend the covenant for rent. Such a desirable rule was not to be denied and was, thereafter, adopted as the law in Missouri.[5] This type of eviction was designated as a "constructive" eviction to distinguish it from actual eviction.

In determining what amounts to a constructive eviction the courts have met with some difficulty, and have refused to formulate any definite test of determination. For instance, in *Lancashire* v. *Garford Mfg. Co.*[6] the court says, ".....The courts of this state have declined to frame a rule of general application by which to determine what amounts to a constructive eviction of a tenant, and it is impossible to lay down any general rule with reference to this matter. ...." There are, however, some generalities which may be deduced from the cases. Clearly, the tenant must abandon the premises in a reasonable time after the occurrence of the objectionable interference, and

2. The court said, "Without discussing the question at any length, we may say that the authorities cited agree that it is not every trespass by the landlord that will amount to an eviction. To have that effect, the acts done or omitted by the landlord must be of such a nature as to justify the vacation of the premises by the tenant, and the tenant must, in fact, vacate for that reason before he can avoid liability for rent under his lease. That was not done in this case."

3. Cibel and Hill's Case, 1 Leon. 110 (1588).

4. Dyett v. Pendleton, 4 Cow. (N. Y.) '581 (1825); 8 Cow. (N. Y.) 727 (1826).

5. Jackson v. Eddy et al. 12 Mo. 209 (1848).

6. 199 Mo. App. 418, 203 S. W. 668 (1918).

the abandonment must be in consequence of such interference,[7] for an eviction connotes a dispossession whether it be actual or constructive. Further, there must be an intention on the part of the landlord to dispossess the tenant.[8] This intention is purely legal in its nature and is presumed from the character of the acts which cause the tenant to vacate.[9] There are few cases in which the actual intention of the landlord is regarded as material, the principal case being one of these. The question of actual intent arises, it seems, only when the acts themselves are such as do not afford a presumption of intent.[10] Another general requisite is that the interference complained of be of a substantial and somewhat permanent or continuing nature.[11] As in actual eviction, a mere trespass or inconsequential interference is not sufficient to justify a suspension of the rent.[12] Interference with an appurtenant easement has been held to be of grave enough character to release the tenant from payment of rent when followed by his abandonment.[13]

The whole question of whether or not there was a constructive eviction is one for the jury[14]: that is, it is for them to decide whether the acts of the lessor are of a substantial and permanent nature, showing an intention to dispossess the tenant, and actually interfering with his use and enjoyment. But the courts frequently treat the problem as a matter of law, in determining whether the facts are, or are not, sufficient to justify the jury's verdict. An example of such treatment is found in the principal case.

The true nature of an eviction by the landlord involves some affirmative act of commission, a tortious act on his part. So it is clear that if the landlord forcibly deprives the tenant of the use of a substantial portion of the lease-

7. Dimmack v. Daly, 9 Mo. App. 355 (1880); Witte v. Quinn 38 Mo. App. 681 (1890); 12 A. L. R. 166 (1921); Griffin v. Freeborn, 181 Mo. App. 203, 168 S. W. 219 (1914) (15 months held an unreasonable time); Banister Real Estate Company v. Edwards, 282 S. W. 138; (Mo. App. 1926); Muehling et al. v. Juvenile Shoe Corporation, *supra* note 1, at 939. But where it is impossible for the tenant to totally abandon the leasehold, he is relieved from payment of the rent in proportion to the *quantum* of the premises vacated. Dolph v. Barry, 165 Mo. App. 659, 148 S. W. 196 (1912). There a subtenant refused to vacate the portion of the leasehold demised to him, and the court said that the rule prohibiting apportionment of the rent in cases of actual partial eviction does not apply, for the reason for the non-apportionment in those cases is that the landlord cannot apportion his wrong, but here it would be unjust to hold the tenant to pay all the rent because he did not fully abandon, such abandonment being impossible under the circumstances.

8. Griffin v. Freeborn, *supra* note 7, at 209; Lancashire v. Garford Mgf. Co., *supra* note 6, at 421; Muehling et al. v. Juvenile Shoe Corporation, *supra* note 1, at 939.

9. Rogers v. Grote Paint Company, 118 Mo. App. 300, 94 S. W. 548 (1906).

10. Skally v. Shute, 132 Mass. 367 (1882).

11. Delmar Investment Company v. Blumenfield, 118 Mo. App. 308, 94 S. W. 823 (1906); 21 L. R. A. (N. S.) 38, at p. 39 (1909).

12. McFadin v. Rippey, 8 Mo. 738 (1844).

13. O'Neill v. Manget, 44 Mo. App. 279 (1891).

14. Jackson v. Eddy et al., *supra* note 5.

hold, the tenant may treat the actual partial eviction as a constructive eviction from the whole, and vacate the premises absolved from further payment of rent.[15] Likewise where the landlord himself carelessly allows waste to run through the floor onto a tenant's goods beneath in a leased storeroom, the tenant may abandon the premises without liability for after accruing rent.[16] And where filth seeped into the tenant's leasehold from a toilet, control of which was retained by the landlord, creating an intolerable condition, the tenant was justified in abandoning the premises and refusing to pay rent thenceforth.[17] On the other hand, untenantability of the premises leased, because of the presence of great numbers of cock-roaches and the defective condition of the plumbing, where there was no covenant by the lessor to repair, was not sufficient to justify the tenant in abandoning the premises and asserting a constructive eviction, there being no wrongful act on the part of the landlord.[18] And where the landlord attempted to lease the premises presently during the tenant's term, his act, being legally insignificant as far as disturbing the tenant's possession, was no ground for claiming an eviction.[19]

A constructive eviction by a landlord is, in keeping with the analogy from which the doctrine developed, an affirmative act of commission which breaches the covenant for quiet enjoyment, followed by an abandonment by the tenant. The act involved should be one akin by analogy to a physical dispossession, but unfortunately, the courts occasionally lose sight of this requisite and apply the term to acts of omission, mere breaches of covenants in the lease which make the premises less serviceable for certain purposes, or cause damage which should be the subject of an action for breach of contract alone. For instance, in *Dolph* v. *Barry*[20] it was held that the landlord's failure to repair downspouts on the leased premises, as covenanted, which omission caused water to seep through the roof and damage the tenant's goods, was sufficient to warrant the tenant's abandonment of the leasehold and nonpayment of rent thereafter. And in *Huggins et ux.* v. *Jasper*[21] the court said that if the tenant who abandoned could show ". . . . .not only that the plumbing was defective but that its condition rendered the premises untenantable and that the landlord with knowledge of these facts violated an agreement to keep the premises in repair", he has a good defense to an action for rent.

15. Smith v. Raleigh, 3 Camp. 513 (1814). It is to be noted that the tenant may retain possession of part of the premises, where there has been actual partial eviction, and avoid payment of any rent, but this is not constructive eviction.

16. Jackson v. Eddy et al., *supra* note 5.

17. Smith v. Greenstone, 208 S. W. 628 (Mo. App. 1918).

18. Griffin v. Freeborn, *supra* note 7.

19. Mills v. Sampel et al., 53 Mo. 360 (1873).

20. *Supra* note 7.

21. 134 Mo. App. 1, 114 S. W. 545 (1908).

Similarly, in *Delmar Investment Company* v. *Blumenfield*[22] the court intimated that the falure to provide modern elevator service as covenanted, if continuing for such a period of time as to substantially interfere with the use of the leasehold, and if followed by an abandonment by the tenant, would vindicate non-payment of rent accruing after the vacation. Likewise, in *Banister Real Estate Co.* v. *Edwards*[23] the court squarely held that breach of a covenant to make repairs necessary to tenantability warranted a tenant in vacating and defending an action for subsequently accruing rent. Notwithstanding that this apparent extension of the doctrine of constructive eviction is well established in Missouri by the foregoing decisions, such loose application of the term will eventually obscure the true nature of this type of eviction.

Ordinarily the landlord is not chargeable with the acts of his tenant on the leased premises, but if, through his connivance or consent, tenants of a building maintain a nuisance on the premises which interferes with the use and enjoyment of the leasehold by another tenant, the tenant so disturbed may treat the acts as authorized by the landlord, and vacate the premises without further payment of rent. So, where the lessor of an apartment house installed fixtures in the basement, invited the tenants to use it as a laundry, and the resultant use thereas made the tenant's flat above untenantable, the tenant was justified in abandoning the premises and refusing to pay rent thereafter.[24] In *Lancashire* v. *Garford Mfg. Co.*[25] a tenant from month to month maintained a nuisance above the apartment of another tenant for a longer term of the same lessor. On receiving notice of the nuisance, the landlord refused to terminate the objectionable tenancy, as he might well have done by giving the statutory notice. The court found that his conduct amounted to a maintenance and authorization of the nuisance. This seems to be a fair result and a desirable extension, if it be such, of the doctrine of constructive eviction[26].

But if the landlord has not the opportunity to terminate the tenancy as in *Lancashire Mfg. Co.* v. *Garford*, there is no eviction where the landlord lets the premises to a tenant who maintains thereon a private nuisance, unless the nuisance is one that necessarily arises from the tenant's ordinary use of the premises for the purposes for which they were let.[27] The court says in *Gray* v. *Gaff*[28] that "the mere fact that the landlord rents premises to a tenant who carries on a business there incompatible with the convenient occupation of

22. *Supra* note 11.

23. *Supra* note 7; *contra:* Goodfellow v. Noble, 25 Mo. 60 (1857).

24. Phoenix Land and Improvement v. Seidel, 135 Mo. App. 185, 115 S. W. 1070 (1909).

25. *Supra* note 6.

26. But the lessor in such a case should be given ample time to abate the nuisance or terminate the tenancy.

27. Gray v. Gaff, 8 Mo. App. 329 (1880); 5 L. R. A. (N. S.) 856, at 857 (1907); French v. Pettingill, 128 Mo. App. 156, 106 S. W. 575 (1907).

28. *Supra* note 27.

adjoining premises also rented by the same landlord, does not amount to an eviction. . . . ."

In view of the above examination of authority and principle, it is submitted that the defense asserted in the principal case would fail on any one of the three considerations motivating the court's affirmance of the judgment.

W. H. B. Jr.

CONTRACTS—CONSIDERATION—REFRAINING FROM BREAKING CONTRACT.

Curry v. *Boeckeler Lumber Co.* [1]

In this case the St. Louis Court of Appeals by way of *dictum* lays down the rule that a man has a right to break his contract and that refraining from so doing will constitute consideration for the promise of the other contracting party to pay more for the performance of the original contractual obligation. While this statement was unnecessary to the decision, it was so sweeping and the question is so fundamental that it seems deserving of some brief consideration. The reasons advanced to sustain this rule were: (1) that a party injured by a breach of a contract has the right to be compensated only in damages, (2) the agreement is entered into with this right in view, and (3) the privilege of breaking one's contract is essential to civil liberty. Lord Coke seems to have been one of the earliest authorities to have advanced the proposition that a promisor has the right to break his contract[2] having an election either to perform or to pay damages. Mr. Justice Holmes has, in modern times, taken the same position[3] and cases in some jurisdictions[4] have been found to the same effect.

The only possible justification for a holding that a promisor's refraining from breaking his contract will afford consideration to support the promise of the other contracting party is the reason advanced by the court in the principal case, namely, that the promisor has the election to either perform or to pay damages—that either course of conduct is his legal privilege. If this be the legal privilege of the promisor, then his giving up such privilege and continuing performance of his original obligation will be both detriment to himself as a promisee and benefit to the other contracting party as promisor, thereby satisfying in every respect the requirements of consideration as prescribed by the authorities.[5] It hardly seems accurate to say that a contract-

1. See 27 S. W. (2nd) 473, 475 (Mo. 1930).

2. Bromage v. Genning, 1 Rolle 368. (1616 K. B.)

3. Holmes, The Common Law, (1881) 301.

4. Munroe v. Perkins, 26 Mass. 298 (1829); Goebel v. Linn, 47 Mich. 489, 11 N. W. 284 (1882); Lawrence v. Davey, 28 Vt. 263 (1856); see Chellis v. Grimes, 72 N. H. 104, 106, 54 Atl. 943, 944 (1903)

5. 2 Williston, Contracts, (1920) Sec. 102. "In bilateral contracts a detriment suffered by the promisee at the promisor's request is sufficient consideration."

ing party is discharging his duties under the agreement if at his election he either performs the same or pays damages for the breach thereof. Concededly, any contractor has the power to break his agreement but the exercise of that power would seem to be a violation of his primary duty, which violation, when established in an appropriate suit, will entitle the aggrieved party to a judgment or decree imposing upon the contractor a liability of one kind or another. If the action were brought at law the liability would be to pay damages; on the other hand if the action were properly brought in equity the liability would be to specifically perform the broken contract.

Suppose that A and B enter into a bilateral contract whereby it is agreed that A shall convey Blackacre to B in return for B's promise to pay A a stipulated purchase price. In case of a breach by A, a court of law, upon proper proof of such breach, would adjudge that B have judgment against A for damages. It is believed that the theory underlying such a judgment would not be that A was privileged to break his contract and pay damages. The court is not adjudging or affirming any rights or privileges in A's favor. Rather, the theory underlying the judgment is that A, by failing to perform his *contractual duty* has had imposed upon him by the court a *secondary* liability which requires him to make compensation for his failure to convey Blackacre. If this analysis of a judgment rendered in a suit at law be accurate, it seems sound to say that a contracting party is not privileged to break his agreement if he is willing to day damages; that the breach of a contract by a party thereto is merely the exercise of a human power illegally, and that the proposition advanced by way of *dictum* in the principal case is unsound.

But the soundness of the proposition that a contractor is privileged to breach his agreement and pay damages can be tested in another way. To illustrate, let it be supposed that A makes a contract with B whereby A obligates himself as above assumed except that the agreement carries also a stipulation whereby A, in the event of a breach, agrees to pay a reasonable sum as liquidated damages. Could A, under such a contract defeat an action for specific performance by B by tendering B the amount of liquidated damages? If such a tender would be a complete defense, the St. Louis Court of Appeals would be correct in the statement that a promisor has a right to break his agreement if he pays damages. On the other hand, if such a tender would not constitute a defense, it would only be for the reason that A has no election to either perform or pay damages but that he has one primary duty and the election as to whether he should perform or pay damages is not with him but with B. The cases have held that the election is with B;[6] and he is entitled to specific performance; that A is not privileged to either perform or pay the

6. Wills v. Forester, 140 Mo. App. 321, 124 S. W. 1090 (1910); Davis v. Isenstein, 257 Ill. 260, 100 N. E. 940 (1913); 1 Pomeroy, Equity Jurisprudence, (4th ed. 1918), sec. 446, 447 (See footnote 447 for explanation).

damages and only one primary duty rests upon him. Of course, normally, when a contracting party wrongully refuses to perform his contract, the result of the exercise of such power is only to subject him to a liability to pay damages but this is because courts have, in the average run of cases, found that damages are an ample and adequate remedy. But in those cases where damages are not an adequate and complete remedy, the wrongful breach will subject the wrong doer to the liability of specific performance, even in the face of a stipulation for damages in the event of a breach.

The *dictum* in the principal case runs counter to a line of decisions in Missouri[7] which hold that refraining from breaking a contract is not consideration. Possibly, the case most frequently cited to sustain this proposition is *Lingenfelder* v. *The Brewing Co.*[8] In that case, Plaintiff was under a contract to serve Defendant as an architect. In order to induce Plaintiff to continue his services under the contract Defendant promised to pay Plaintiff an additional bonus upon the completion of the contract according to the original terms thereof. Our Supreme Court held that Plaintiff could not recover the bonus as he gave up no legal right which would constitute consideration by continuing the performance of his contractual obligation. The Court also pointed out that if the rule were otherwise, "it would place a premium upon bad faith and invite men to violate their most sacred contracts that they may profit by their own wrong."[9] It would seem then that the *dictum* in the instant case is unfortunate and it is to be hoped that it will not be followed and will not lead the bar astray.

L. G. L.

7. Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578, 15 S. W. 844 (1891); Brown v. Irving, 269 S. W. 686 (Mo. App. 1925); Hunter Land and Development Co. v. Watson, 236 S. W. 670 (Mo. App. 1922); Koslosky v. Bloch, 191 Mo. App. 257, 177 S. W. 1060 (1915); Wilt v. Hammond, 179 Mo. App. 406, 165 S. W. 362 (1914); Koerper v. Royal Investment Co., 102 Mo. App. 543, 77 S. W. 307 (1903); Wear Bros. v. Schmelzer, 92 Mo. App. 314 (1902); Storch v. Mesker, 55 Mo. App. 26 (1893).

8. *Supra* note 7.

9. 103 Mo. l. C. 593.